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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

MASAYUKI AGURO,

Defendant and Appellant.

H025440

(Santa Clara County

Super. Ct. No. E9909707)

The trial court convicted defendant Masayuki Aguro of 13 counts of lewd acts on a child under age 14. (Pen. Code, § 288, subd. (a).)¹ It sentenced defendant to 26 years in prison. On appeal, defendant contends that the sentence in excess of 16 years is unauthorized because it is contrary to an extradition agreement between the United States and Japan. We affirm the judgment.

BACKGROUND

Between July 1998 and January 1999, defendant's wife babysat her friend's five- and seven-year old daughters. In January 1999, the daughters told their mother about various lewd acts that defendant had perpetrated upon them when he was alone with them during babysitting. Defendant admitted committing many of the acts to investigators. The People filed a complaint that charged defendant with two counts of violating section

¹ Further unspecified statutory references are to the Penal Code.

288.5 (engaging in three or more acts of substantial sexual conduct with a child under age 14).

Defendant was a citizen of Japan. Before his preliminary hearing, he fled to that country. He later arranged for his furniture to be moved there.

The United States and Japan maintain an extradition treaty that states the terms under which one country will extradite to the other a person sought for prosecution or punishment. Pertinent here is the treaty term that prohibits the party who is requesting extradition from detaining, prosecuting, trying, or punishing the sought person for an offense other than that for which extradition was granted. Two exceptions to this prohibition are when (1) the person consents, and (2) the offense prosecuted, tried, or punished for involves the basic facts that constitute the offense for which extradition was granted.

The United States request to extradite defendant recited that the State of California had charged defendant with two counts of continuous sexual abuse of a child under 14 in violation of section 288.5. It stated that “Under California law, the maximum sentence that may be imposed for the above offenses is sixteen years’ imprisonment.” It further stated that “The Embassy has the honor to assure the Ministry that [defendant] will not be detained, prosecuted, tried, or punished except for the offense for which this request for extradition is made, other than in accordance with . . . the Treaty” A supporting affidavit by the People’s prosecutor reiterated that defendant had been charged with two counts of violating section 288.5 and quoted the statute, which states, in pertinent part that any person, as defined, who is guilty of “the offense . . . shall be punished by imprisonment in the state prison for a term of 6, 12, or 16 years.” The affidavit continued: “Pursuant to California criminal law, if convicted the defendant will be sentenced to either six, twelve or sixteen years. The sentencing court will exercise its discretion in determining whether the crime, and the defendant’s history, are mitigated or aggravated. If the court concludes that there is neither mitigating or aggravating

evidence available then it will impose the middle term of twelve years.” The affidavit concluded that extradition was “requested solely for the prosecution of the criminal offenses of CONTINUOUS SEXUAL ABUSE OF A CHILD UNDER FOURTEEN-RESIDENT CHILD MOLESTING, and not for any other offense.” (Original capitalization.) It also attached a copy of section 288.5.

Japan extradited defendant, and defendant was held to answer after a preliminary hearing. The People later amended the information to allege 13 specific sex offenses as alternatives to the section 288.5 offenses.²

After the prosecutor delivered his opening statement to the jury, defendant reached an agreement with the prosecutor to waive a jury trial and submit the case to the court on the basis of the police reports, preliminary hearing transcript, tape-recorded statements by defendant and the victims, and other writings. The following colloquy then occurred.

“[Defense counsel]: The promise made to [defendant] is that the court would impose a sentence of no more than 32 years and no less than 16 years.

“THE COURT: That’s my understanding. Is that your understanding of what’s going to happen right now [defendant]?

“THE DEFENDANT: Yes, your honor. [¶] . . . [¶]

“THE COURT: Do you understand the charges against you?

“THE DEFENDANT: Yes, your honor.

“THE COURT: Have you had enough time to speak [to] your attorney about the charges so that you understand what the district attorney must prove to show your guilt as well as any possible defense you might have?

“THE DEFENDANT: Yes, your honor.

² Section 288.5, subdivision (c), prohibits other felony sex offenses from being charged in a section 288.5 prosecution unless the other offenses occurred outside the charged time period or are charged in the alternative.

“THE COURT: Are you satisfied with that advice and representation?

“THE DEFENDANT: Yes, your honor.

“THE COURT: Now, in return for your waiver giving up certain rights, the indicated sentence if you are convicted of these charges or some of these charges would be between 16 years and 32 years. Is that your understanding?

“THE DEFENDANT: Yes, your honor. [¶] . . . [¶]

“THE COURT: Now, under the agreement you would not be granted probation if you are convicted. Your sentence would be state prison somewhere between 16 years to 32 years. [¶] Once you are released, you would be placed on parole for three years. That can be extended to a fourth year. If you violate the terms and conditions of parole, you can be returned to prison for up to one year for each parole violation. [¶] Do you understand this consequence?

“THE DEFENDANT: Yes, your honor.”

The prosecutor then waived the People’s right to a jury trial and, pursuant to the agreement, defendant made and the trial court granted a motion for mistrial coupled with defendant’s waiver of double jeopardy.

After his conviction, defendant moved to limit the trial court’s sentencing discretion on the basis that the extradition agreement provided that he could suffer a maximum sentence of 16 years. The People replied that (1) the treaty was not violated because defendant was punished for offenses arising out of the same operative facts for which he was extradited, (2) defendant did not establish that Japan objected to his punishment (presumably relevant because defendant was not a party to the extradition agreement), (3) the extradition papers were ambiguous whether defendant was subject to a maximum of 16 years or a maximum of 16 years for each of the two offenses (presumably making proof of Japan’s objection to defendant’s sentence more relevant), and (4) defendant agreed to the sentence that he received.

DISCUSSION

The parties reiterate their arguments here. The People have refined one of their points and the parties argue whether federal law allows defendant standing to assert a violation of the extradition agreement. We need not explore this murky area since other grounds support the judgment.

First, there was no violation of the extradition agreement in the sense that a maximum term of 16 years was a condition therefore. This follows because (1) the language pertaining to defendant's possible punishment was not couched as a condition of the agreement but as contextual for the offenses sought to be prosecuted, and (2) the treaty and the agreement allow prosecution for different offenses having the same basic facts and, thus, must logically allow for the punishment attendant to such different offenses. Defendant offers no reasoned counter to this point.

And second, even if the extradition agreement limited the trial court to imposing a 16-year maximum sentence, defendant agreed to the 16- to 32-year range in exchange for the court trial. As defendant concedes, his "conviction was not a 'foregone conclusion.'" Thus, defendant no doubt believed that he stood a better chance in front of the judge. He therefore risked a higher maximum sentence for the possibility of acquittal or conviction of lesser offenses. Indeed, the trial court acquitted defendant of the two most serious charges and convicted defendant of the lesser, alternative charges. And defendant might have received less than 16 years had he been acquitted of some of the lesser charges. In any event, the point is that defendant made a strategic decision to waive reliance on any extradition-based 16-year maximum sentence and is now playing fast and loose with the judicial system by implicitly asking us to honor the advantageous parts of his agreement while allowing him to circumvent the disadvantageous parts. As to this, defendant also offers no reasoned disagreement.

DISPOSITION

The judgment is affirmed.

Premo, J.

WE CONCUR:

Rushing, P.J.

Elia, J.